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SUPREME COURT, U.S.

(5)

No. 03-507

IN THE

Supreme Court of the United States

FAX.COM, INC.,

Petitioner,

v.

STATE OF MISSOURI EX REL. NIXON,
ATTORNEY GENERAL, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15(8), Petitioner Fax.com submits this supplemental brief to call to the Court's attention an Order of the Federal Communications Commission ("FCC") issued after Petitioner's last filing. *See In re matter of Fax.com, Inc.*, Order of Forfeiture, adopted December 31, 2003, and released January 5, 2004 (published at http://hraunfoss.fcc.gov/edocs_public/attach-match/FCC-04-2A1.doc) (the "Order"). The Order determined that Fax.com violated section 227(b)(1)(C) of the Telephone Consumer Protection Act (the "TCPA") "by sending unsolicited advertisements to telephone facsimile machines on behalf of its clients on 489 separate occasions." Order at ¶ 1. As a result of these 489 single page faxes, the FCC assessed the "statutory maximum" forfeiture of $11,000 per fax for a total forfeiture award of $5,379,000 against the Petitioner. *Id.* at ¶ 7. It is significant that the faxes subject to the forfeiture Order all predate the decision of the Eighth Circuit which overturned the trial court's determination that the TCPA's ban of unsolicited fax advertising violates the First Amendment. *Id.* at fn.18 ("The transmissions were received from September 2001 until June 2002").

It is more significant, however, that the Order highlights the onerous burden that the TCPA places on commercial speakers. By ordering a forfeiture of $11,000 per fax, threatening more than one hundred clients of Fax.com with monetary forfeitures, and wholly ignoring those recipients who wish to receive unsolicited faxes, the Order stifles an entire medium for commercial speech under all but the most procrustean of circumstances. *Id.* at ¶¶ 8, 26. Specifically, the FCC's Order confirms and emphasizes that the TCPA enacts a "blanket prohibition" on facsimile advertising (Order at fn. 10), rather than adopting a more narrowly tailored approach such as requiring advertising

faxes to include an opt-out number (which the faxes at issue did, *see id.* at ¶21) or implementing a do-not-fax list like the do-not-call list. Moreover, the Order makes clear that the Act's "blanket prohibition" does not recognize permission to transmit faxes through an established business relationship and that it demands prior written consent to send any commercial fax:

> The Commission originally determined that an established business relationship between a fax sender and recipient demonstrates consent to receive facsimile advertisements. Recently, however, the Commission concluded that an established business relationship does not constitute prior express invitation or permission to send fax advertisements, and that a consumer's invitation or permission must be recorded in a signed, written statement that contains the telephone number where faxes may be delivered and that clearly evinces the consumer's agreement to receive fax advertising from the sender.

Order at fn. 10 (citing 2003 TCPA Report and Order, 18 FCC Rcd at 14,014). Thus, a business will not be able to send faxes even to longtime customers or clients without first having obtained specific permission in writing. This "blanket prohibition" of unsolicited faxes constricts the rights of commercial speakers, ignores the realities of modern communication methods, and confirms the need for this Court's immediate intervention.

CONCLUSION

The petition for writ of certiorari should be granted.

January 2004

Respectfully submitted,

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